directs that the trial of the case shall be by a judge of the High Court sitting alone.

Section 39B(3) of the Act provides that a prosecution under that section shall not be instituted except by or with the consent of the Public Prosecutor. That subsection also directs that the case *shall not be further prosecuted until the consent has been obtained.* In respect of the respondent the Public Prosecutor's consent was issued only on 16 July 1984.

Section 39B(4) provides that when a person is brought before a court but before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead.

Section 254 of the Criminal Procedure Code deals with the power of the Public Prosecutor to decline to prosecute further at any stage of the trial. After Merdeka this provision finds its basis in art 145(3) of the Federal Constitution which provides that it is in the Attorney General's discretion to discontinue any criminal proceeding in the civil courts. It is clear from the language of s 254 of the Criminal Procedure Code both in cl (1) and (2) thereof that the power of the Public Prosecutor is exercisable *at any stage of any trial.*

Therefore on a proper reading of s 39B and s 41A of the Dangerous Drugs Act 1952, it is clear that s 254 of the Criminal Procedure Code cannot apply to the facts of this case because no trial had commenced before the magistrate on 9 March 1984.

On the question of the application of the plea of autrefois acquit this doctrine is in fact enshrined in art 7(2) of the Federal Constitution which declares that a person who has been acquitted or convicted shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

But autrefois acquit means 'formerly acquitted'. It is a bar to criminal prosecution when the prisoner has already been tried for the same offence before a court of competent jurisdiction and has been acquitted. We need not cite authorities for this. The plea of autrefois acquit can only succeed where the accused was in jeopardy in the first proceeding, that is to say, where the merits of the prosecutor's case have been gone into so that the decision of the court was that the evidence was insufficient to support the prosecution.

We accordingly allowed the appeal by the Public Prosecutor and quashed the order of the learned judge.

Appeal allowed.

Solicitors: *Atma Singh Veriah & Co.*

Reported by *Prof Ahmad Ibrahim*

Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CIVIL APPEAL NO 102 OF 1987
HASHIM YEOP A SANI AG CJ (MALAYA), MOHAMED YUSOFF SCJ AND AJAIB SINGH J
29 NOVEMBER AND 12 DECEMBER 1988

Civil Procedure – Action for negligence arising from road accident – Third-party notice against Superintendent of District Hospital, Taiping and Government of Malaysia – Whether action against third parties time-barred – Public Authorities Protection Act 1948, s 2(a) – Rules of the High Court 1980, O 16 – Civil Law Act 1956, s 10(1)

In this case, there was a road accident on 14 July 1981 involving a motorcar driven by the appellant and a motorcycle. The motorcyclist and his pillion rider sustained injuries. On 16 July 1981, the motorcyclist died at the Taiping General Hospital of septicaemia and gas-gangrene secondary to multiple fractures. On 19 July 1983, the administrator of the estate of the deceased motorcyclist, together with the pillion rider, brought an action claiming damages against the appellant. The appellant on 4 January 1985 took out third-party notices against the Superintendent, District Hospital, Taiping and the Government of Malaysia claiming contribution and indemnity. The third parties denied that the appellant was entitled to contribution or be indemnified by them and also pleaded that the appellant's action against the third parties was statute-barred by reason of s 2(a) of the Public Authorities Protection Act 1948. When the case came up for hearing, the learned trial judge acceded to the request of counsel for the third parties that the defence of limitation raised by them against the appellant be tried as a preliminary point of law. After hearing submissions, the learned judge ruled that the defence of limitation succeeded and dismissed the appellant's claim against the third parties. The appellant appealed.

Held, allowing the appeal:

(1) Section 10(1)(c) of the Civil Law Act 1956 gives a right to a tortfeasor to recover contribution from any other joint tortfeasor who has caused or contributed to the same damage. Order 16 of the Rules of the High Court 1980 deals with third-party proceedings but a proceeding under the order should not be treated in the same way as an action between a plaintiff and defendant.

(2) Third-party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant. When a defendant is made liable to the plaintiff, he then has a right open against a third party to establish that he possesses a right to contribution or indemnity from the third party. Time should begin to run from the date the defendant is liable.

(3) Therefore in the case of the third parties here, s 2 of the Public Authorities Protection Act 1948 should not assist them although the third-party notices were issued on 4 January 1985 when the period of 36 months had elapsed by then from the date of the accident (14 January 1981) or the date of death of the motorcyclist (16 July 1981).

Cases referred to

1 *Merlihan* v *AC Pope Ltd (JW Hibbert Pagnello, Third Party)* [1946] KB 166 (refd)
2 *Hordern Richmond Ltd* v *Duncan* [1947] 1 All ER 427 (refd)

3 *George Wimpey & Co Ltd* v *British Overseas Airways Corporation* [1955] AC 169 (refd)
4 *Brambles Constructions Pty Ltd* v *Helmers* (1965-66) 114 CLR 213 (refd)
5 *Freeborn* v *Leeming* [1926] 1 KB 160 (refd)
6 *Carey* v *Bermondsey Borough Council* (1903) 67 JP 447 (refd)

Legislation referred to
Civil Law Act 1956 s 10(1)
Public Authorities Protection Act 1948 s 2(a)
Rules of the High Court 1980 O 16

Appeal from: Civil Suit No 584 of 1983 (High Court, Ipoh)

V Rajendran (*S Nanthabalan* with him) for the appellant.
Tee Geok Hock, Federal Counsel, for the first respondents.

Cur Adv Vult

Hashim Yeop A Sani Ag CJ (Malaya) (delivering the judgment of the court): There was a road accident on 14 July 1981 involving a motorcycle and a motorcar. The motorcyclist and his pillion rider sustained injuries. On 16 July 1981 the motorcyclist died at the Taiping General Hospital of septicaemia and gas-gangrene secondary to multiple fractures.

On 19 July 1983 the administrator of the estate of the motorcyclist together with the pillion rider took out a writ against the defendant claiming damages on the grounds of negligence of the defendant in driving his motor vehicle. The defendant then filed his statement of defence and counterclaim.

On 4 January 1985, pursuant to leave of the court given on 22 January 1984 under O 73 r 8 of the Rules of the High Court 1980, the defendant took out third-party notices against the Superintendent, District Hospital, Taiping and the Government of Malaysia as third parties. The claims of the defendant against the third parties were for contribution and/or indemnity under s 10(1) of the Civil Law Act 1956.

The third parties denied that the defendant is entitled to contribution or be indemnified by them. Pursuant to leave of the court on 6 March 1981 the third parties amended their defence by pleading that the defendant's action against the third parties was statute-barred by reason of s 2(a) of the Public Authorities Protection Act 1948.

It is convenient at this juncture to set out the relevant statutory provisions.

Section 2(a) of the Public Authorities Protection Act 1948 provides for the protection of persons acting in the execution of a statutory or public duty against any suit, action, prosecution or proceeding and such suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within 36 months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within 36 months next after the ceasing thereof.

Section 10(1)(c) of the Civil Law Act 1956 provides that where damage is suffered by any person as a result of a tort:

> any tortfeasor *liable in respect of that damage* may recover contribution from any other tortfeasor who is, or *would if sued have been, liable* in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

When the case came up for hearing before the learned judge in the High Court, Ipoh on 3 October 1987 the judge acceded to the request of counsel for the third parties that the defence of limitation raised by them against the defendant be tried as a preliminary point of law. The judge heard submissions and ruled that the defence of limitation succeeded and dismissed the defendant's claim against the third parties. Hence the appeal.

At the outset it may be observed that s 10(1)(c) of the Civil Law Act is not an easy statutory provision to construe. The provision is more or less a direct copy of s 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act 1935 of the United Kingdom. In *Merlihan* v *AC Pope Ltd (JW Hibbert Pagnello, Third Party)*[1] the court examined the provisions of the 1935 Act. It was argued in that case that in so far as concerned the defendants as against the third party, the date of the accident, 15 March 1943, was irrelevant and that the date of the cause of action as between them must be taken to have been 14 June 1945 because that was the first date on which they became liable by the finding of the court. Thus it was argued that in a third-party proceeding for contribution the Limitation Act has no application. But Birkett J held that the third party was protected by the Limitation Act 1939. He was also of the opinion that when s 6(1)(c) of the 1935 Act was drafted that particular problem was not foreseen by the draftsman.

In *Hordern Richmond Ltd* v *Duncan*,[2] Cassels J, however, took the view that the Limitation Act only starts to run in favour of a third party when the defendant in the proceeding has been found to be liable for damages. The learned judge also distinguished the proceeding by the defendant against third parties for contribution.

In *George Wimpey & Co Ltd* v *British Overseas Airways Corporation*[3] the respondent was a public authority whose employee, who was injured in an accident, had brought an action against the appellant company more than 12 months after the accident, claiming damages for negligence. The appellant company served a third-party notice on the public authority claiming contribution under s 6(1)(c) of the 1935 Act. Later the public authority was joined as a second defendant and pleaded as a defence to both the claim in the action and the third-

party proceedings that it was protected by the Limitation Act 1939 in that the proceedings had not been commenced before the expiration of one year from the date on which the cause of action accrued, that is, the date of the tort. The trial judge gave judgment in favour of the injured employee against the appellant company but held that the action against the public authority failed because it was statute-barred.

The facts of that case are not altogether similar to the facts of the present case before us but that case is useful to find the proper interpretation of s 6(1)(c) of the 1935 Act which is the origin of s 10(1)(c) of our Civil Law Act. It was made clear by Lord Reid in that case that before 1935 if judgment was recovered against one joint tortfeasor that judgment was a bar to any action against another joint tortfeasor even although no sum has been or could be recovered under that judgment. This provision, that is, s 6(1)(c) of the 1935 Act removed that bar.

Another case useful to find the proper interpretation of s 10(1)(c) of our Act is the Australian High Court decision in *Brambles Constructions Pty Ltd* v *Helmers*.[4] The High Court dealt with s 5(1)(c) of the Law Reform (Miscellaneous Provisions) Act 1946 of the State of New South Wales which is the corresponding provision and couched in identical language. In that case during the course of the proceedings for negligence the respondent served a third-party notice on the appellant claiming that the appellant by its tortious conduct had caused or contributed to the damage in respect of which the respondent was being sued and claimed contribution pursuant to s 5(1)(c) of the New South Wales Act. But at the date when the respondent gave his third-party notice to the appellant more than six years had elapsed since the date of the occurrence of the damage and the appellant pleaded in that action the appropriate statute of limitations. Barwick CJ said at p 219:

> The effect of s 5(1)(c), in my opinion, is that a tortfeasor who has come under an enforceable obligation to pay money for the damage caused by his tortious act may successfully recover contribution from another tortfeasor who has also come under an obligation to pay money in respect of the same damage and he may also recover contribution from any other tortfeasor who, not having been sued by the injured party, had he been sued, would have been found to have caused or contributed to the same damage by a tortious act.

Thus upon its proper construction that provision in the New South Wales Act does not make available to the defendant tortfeasor in an action for contribution any time limitation which would have been available to him in an action of tort brought against him by the injured party. It was held that the provision should be read 'without the importation of any temporal element' or as if the words 'at any time' were present after the words 'if sued'.

The respondents relied also on *Freeborn* v *Leeming*.[5] Apart from the fact that it is an old case the facts are actually not applicable here. There the plaintiff, being injured in an accident, was taken to a workhouse infirmary and placed under the care of the defendant, the medical officer. The defendant negligently failed to diagnose the nature of the plaintiff's injury and made no attempt to give him the treatment which if given at the time would have effectually cured him. On 15 October 1923, the plaintiff left the infirmary and from that time ceased to be under the defendant's care. He consulted another doctor, who discovered that his hip was dislocated, but as it was then too late to apply the necessary remedy, the plaintiff's injury was permanent. On 25 April 1924, more than six months after he had ceased to be under the defendant's care, he brought his action claiming damages for negligence. It was held that on the authority of *Carey* v *Bermondsey Borough Council*[6] the action was barred by s 1 of the Public Authorities Protection Act 1893, not having been commenced 'within six months next after the act, neglect, or default complained of'.

In our opinion the answer to the appeal before us lies in ascertaining the true object of s 10(1)(c) of our Civil Law Act. Like its English predecessor the provision gives a right to a tortfeasor to recover contribution from any other joint tortfeasor who has caused or contributed to the same damage.

We also do not think that a proceeding under O 16 of the Rules of the High Court 1980 is intended to be treated in the same way as an action between a plaintiff and a defendant.

Third-party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant. When a defendant is made liable to the plaintiff, he then has his right open against a third party to establish that he possesses a right to contribution or indemnity from the third party. Time should begin to run from the date the defendant is held liable.

Therefore in the case of the third parties before us s 2 of the Public Authorities Protection Act 1948 should not assist them although the third-party notices were issued on 4 January 1985 when the period of 36 months had elapsed by then from the date of the accident (14 July 1981) or the date of the death of the motorcyclist (16 July 1981).

We accordingly allowed the appeal with costs to be taxed here and below. Deposit to be returned to the appellant.

Appeal allowed.

Solicitors: *RK Nathan & Co.*

Reported by *Prof Ahmad Ibrahim*